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No. 85-5731

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIE DAVIS BROWN, a/k/a
WILL BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

In cases pending on direct appeal, should the holding in *Batson* v. *Kentucky*, 476 U.S. ____ (1986), be given retroactive effect?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in this matter is reported with the following citation: *United States* v. *Brown*, 770 F.2d 912 (10th Cir. 1985). That opinion, together with "corrected" Page 6 of said opinion and the Order denying rehearing, appear in the Joint Appendix at J.A. 53-60.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Tenth Circuit upon Petition for Rehearing was rendered on 12 September 1985. The Petition for Writ of Certiorari was filed on 10 October 1985. The Writ of Certiorari was granted on 2 June 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

> No person shall be . . . deprived of life, liberty, or property without due process of law.

AMENDMENT VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

The Petitioner, WILLIE DAVIS BROWN, was named in one count of a multiple defendant, multiple count

Indictment returned and superseded by the grand jury in the Western District of Oklahoma (R. Vol. I, pp. 1-8, 14-25), in the Spring of 1984.

That one count charged Petitioner [asserted to be the "Florida Connection"] with being a member of a marijuana and cocaine distribution conspiracy that operated between Florida and Oklahoma City, Oklahoma (J.A. 54). This conspiracy operated, according to the Indictment, from November of 1981 through November of 1983 (R. Vol. I, pp. 14-25). All members of this conspiracy [indicted and unindicted] including those who testified, and from whom "the evidence at trial was largely [established]" were black (J.A. 54).

The Petitioner is black, his co-defendant at trial, Mr. Sam Ponder, is black, and trial counsel for Mr. Ponder, E. Melvin Porter, was "a prominent member of the Oklahoma State Senate, who is a black man" (J.A. 55).

Testimony against the Petitioner at trial, as noted, came largely from three testifying co-conspirators, Mr. Godwin, Mr. Webber, and Mr. Mustin, all of whom received some benefit from the government. The credibility of each of these witnesses was at issue, and this was more particularly so in the case of Mr. Godwin and Mr. Webber (Tr. VII pp. 439-489). The jury believed these men, convicted Petitioner, and said testimony survived review (J.A. 57, 58).

Jury selection for Mr. BROWN required two venire panels, in that challenges for cause and peremptory challenges had extinguished the first panel just prior to a luncheon recess.

The record illustrates (R. Vol. IV, pp. 11, 12-20, 21) that blacks were called upon each panel, and all blacks were

excluded, either by the Court for cause or by the prosecutor peremptorily (J.A. 55, 56).

The second jury panel contained three blacks, and after the prosecutor employed his last remaining peremptory challenge to strike the one black in the "box," the Petitioner, who had extinguished his allotted challenges, requested an additional "one or two challenges in an effort to see if we could seat some black jurors since there [were] several remaining black members of the community in the jury panel" (R. Vol. VI, p. 23). This was requested in conjunction with a particularized objection to the prosecution's selective use of its peremptory challenges to deny petitioner a representative jury by the exclusion of blacks (R. Vol. VI, pp. 20, 21). No blacks served on the jury.

Petitioner was apprised, during the second day of jury deliberations, of a certain communication that had occurred during jury selection the week before, between the Assistant United States Attorney, Ted Richardson, and the jury clerk, Beatrice Slater. The trial court had had an "in-chambers conference" with that jury clerk on 18 June 1984 (J.A. 2-9), after the court clerk, Mr. Bonsiero, had earlier advised the judge that the jury clerk, Ms. Slater, had, during the recess of jury selection and while Ms. Slater was seeking to find an additional panel in an attempt to seat a jury, received a telephone call from Mr. Richardson who "asked her not to include any black people in the additional jurors to be furnished" (J.A. 3). The Court then made inquiry of Ms. Slater and she related that:

> "It was around 12:00 Thursday noon when Mrs. Higgenbottom told me that you [Judge Thompson] needed additional jurors. I went to the clerk's office to get my assistant to help me call them. While in

there, I received this telephone call. He identified himself as Ted Richardson, and as best I remember, he said something about 'are there any blacks on the jury' and it did shock me. I said, 'What?'. He said, 'Don't bring any blacks in' something to that effect." (J.A. 6)

The jury clerk did not honor the request (J.A. 6-8)

After the trial was complete and the jury deliberating, the Court informed counsel of what occurred on 14, 15 and 18 June 1984, and the matter came on for a conference in Judge Thompson's chambers on 20 June 1984 (J.A. 10-52); the Court explained the situation and inquired as to the pleasure of counsel (J.A. 11). Counsel for Petitioner stated:

"Mr. HADDAD: Because of the challenges exercised during the initial jury selection of the initial panel and the objections raised by counsel to the exclusion of blacks both peremptorily and again, with due respect to the Court, on matters that we felt were not justiciable matters of cause, I particularly would request an evidentiary hearing, and I don't mean that to be . . . but I think for preservation of the record, particularly with this occurring which to me is somewhat overt racism in a selection of a jury with black defendants.

* * * I think we need an evidentiary hearing because some due process rights may have been violated." (J.A. 12).

A hearing was had with both the court clerk and the jury clerk testifying (J.A. 10-52). Ms. Slater reiterated the same testimony both on direct examination and upon cross-examination by Mr. Richardson and Mr. Bill Price, the United States Attorney for the Western District of Oklahoma. More cogent to the issues at bar, however,

were certain statements by Mr. Richardson. In one question to Ms. Slater, he offered the following:

> "Q. [By Mr. Richardson]: Okay. And then, I think that when Mr. Bonsiero testified just a few moments ago, he said that as he recalled it that you related that I said something along the lines 'We would like to have as few black jurors as possible in this trial involving Mr. Brown and Mr. Porter.' Does that kind of ring true?
>
> "A. Well, what I remember your saying was 'Don't get any blacks on this jury.'" (J.A. 38).

In his final remarks to the Court, Mr. Richardson, inter alia, stated:

> "And from hearing Mr. Bonsiero testify as he recalled it that Bea had said that I had said something along the lines, and he was of course just paraphrasing and he didn't hear the conversation, that he recalled her saying that I had said, 'We would like to have as few black jurors as possible,' which is exactly either I'm sure what I said or close to that * * *, I was hoping to get as few black of the jurors, not the ones come in but as few jurors as possible * * *." (J.A. 51).

Assistant United States Attorney Richardson also became a witness at this conference, and testified that while several black jurors were excused by the Court, he excused others peremptorily, relating a story regarding another trial he had with co-counsel Porter that had apparently split along racial lines (J.A. 15). [Senator Porter stated he had probably lost as many cases with black citizens as he had won (J.A. 20)]. While stating that it wasn't racist on his part to exclude those jurors, he continued:

> "And so all I'm telling the Court is that *I did take into consideration the fact that these people were black* and that almost everybody . . . I would think they

> would be an incompetent juror almost, if they were from this area and didn't know Senator Porter. And I had planned on excusing them if they indicated in any way that they either knew Melvin Porter or knew who he was." (J.A. 15) [Emphasis supplied].

But Mr. Richardson admitted, upon cross-examination, that one of the black jurors he excused, when questioned by the Court, stated that she could be fair and would not be influenced by Senator Porter (J.A. 18).

Due to the exigencies of the situation, it was agreed that any relief would be sought by post trial Motions; the Court stated:

> "You have made a record in reference to the exercise of peremptory challenges and even to my excusing one or more jurors for cause in this case, and I understand that you have some objection to that, and I've already evaluated those objections and ruled on them * * *." (J.A. 46).

Post trial Motions were thereafter made (R. Vol. I, pp. 44-48) and denied and appeal to the United States Court of Appeals for the Tenth Circuit followed.

The Appellate Court noted that it had considered the government's use of peremptory challenges to exclude potential black jurors, and the prosecutor's "improper" and "ignorant" actions and statements to the jury clerk (J.A. 57), but found that "there has been no showing [in the present case] that the prosecution was responsible for excluding blacks in 'case after case,'" citing to *Swain* v. *Alabama*, 380 U.S. 202 (1965). The decision continues:

> "Because the defendant has not met this threshold requirement we must conclude that he has no valid claim of any unconstitutional use of the peremptory challenge." citing to *United States* v. *Jenkins*, 701 F.2d 850 (10th Cir. 1983). (J.A. 56)

A "Petition for Rehearing or to Certify Conflict" (J.A. 62-65) was filed, and denied by the Court of Appeals (J.A. 66) on 12 September 1985.

SUMMARY OF ARGUMENT

On 30 June 1986, this Court authored *Allen* v. *Hardy*, ___ U.S. ___ (1986), which concluded "that our decision in *Batson* [*Batson* v. *Kentucky*, 476 U.S. ___ (1986)] should not be applied retroactively on collateral review of convictions that became final before our opinion was announced."[1] [footnote of the Court omitted].

Petitioner's conviction was not final, and was indeed pending before this Court some six months prior to the decision in *Batson*. Thus, this case presents the unanswered question as to *Batson's* applicability to cases pending on direct appeal at the time the decision was announced.

Batson, the Court stated in *Allen*, "overruled that portion of *Swain*" [*Swain* v. *Alabama*, 380 U.S. 202 (1965)] that held that "although the use of peremptory challenges to strike black jurors on account of race violated the Equal Protection Clause, a defendant could not establish such a violation solely on proof of the prosecutor's action at his own trial, 380 U.S. at 220-226," thusly "changing the standard for proving unconstitutional abuse of peremptory challenges" [*Allen*, slip opinion at Page 3].

The Court in the rather recent cases of *United States* v. *Johnson*, 457 U.S. 537 (1982) and *Shea* v. *Louisiana*, ___ U.S. ___, 105 S.CT. 1065 (1985), has applied what has come to be called the Harlan approach, so named after the reasoning advanced by Justice Harlan concernig retroactivity [See: *Desist* v. *United States*, 394 U.S. 244 (1969) (dissenting opinion); *Mackey* v. *United States*, 401 U.S.

667 (1971) (separate opinion)], and held that decisions of the Court ["except in certain situations that would be clearly controlled by existing retroactivity precedents to the contrary," *Shea*, supra] at least concerning the Fourth and Fifth Amendment, would apply retroactively to all convictions not yet final at the time the decision was rendered. The Petitioner will urge the same applicability to Sixth Amendment rights by virtue of those decisions and the findings and holdings in *Batson* and other Sixth Amendment cases.

Allen further explained that the Court traditionally weighs three factors [See: *Solem* v. *Stumes*, 465 U.S. 638 (1984), quoting *Stovall* v. *Denno*, 388 U.S. 293, see also *Linkletter* v. *Walker*, 381 U.S. 618] in deciding the "extent to which a new constitutional rule of criminal procedure should be given retroactive effect."

While application of these criteria may well militate against application of *Batson* to habeas corpus review of final convictions, [See: *Solem* v. *Stumes*, supra], said criteria as will be analyzed ought not apply to a case on direct review, *United States* v. *Johnson*, supra; *Shea* v. *Louisiana*, supra. The Petitioner suggests that an analysis of prior precedents does not mandate nonretroactivity as the exclusion of jurors for racial reasons has indeed been condemned by prior decisions of this Court; only the standard and method of proof has changed.

Thus, the "purpose to be served by the new standards" is well defined.

The Petitioner will also argue that reliance upon the "old standards" may well have been misplaced and, as Justice Marshall opined, the Court "should at least give some thought as to whether that reliance should be deemed legitimate," *Allen*, slip opinion, dissent at Page 4.

This is particularly so when the facts of the instant case are considered. It was most certainly not, it is suggested, the intent of the *Swain* Court that a prosecutor could engage in such overt exclusion of blacks with impunity.

Retroactive application of the new standard to cases presently pending on direct appeal ought not "seriously disrupt the administration of justice" [*Allen*, slip opinion at Page 5], for this will not "require trial courts to hold hearings, often years after the conviction became final," [*Allen*, slip opinion at Page 5], but rather would apply the new standards to a narrowly defined group of cases with a properly preserved issue involving non-final convictions.

The Court should hold, therefore, that "Justice Harlan's reasoning—that principled decisionmaking and fairness to similarly situated Petitioners requires application of a new rule to all cases pending on direct appeal" [*Shea*, supra, 105 S.Ct. at 1070], and find that Petitioner is entitled to the benefit of the ruling in *Batson* v. *Kentucky*, supra.

ARGUMENT

THE DECISION OF THE COURT IN *BATSON* V. *KENTUCKY* OUGHT APPLY RETROACTIVELY TO CASES PENDING UPON DIRECT REVIEW.

The Court, since its decision in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), has had occasion to address the issue of retroactive application of new rulings of constitutional procedures, and the standards adopted thereby on numerous occasions. While a balancing test was established to inquire into the subject, the "outcome of the balancing test varied considerably," *Kirk* v. *United States*, ___ F.2d ___, District of Columbia Court of Appeals, Case No. 85-804, decided 5 June 1986.

Rather than trace the history of retroactivity and attempt to analyze and compare the numerous cases decided, Petitioner will address the rather recent decisions of the Court, as these relate to prior decisions upon the issue and to the case at bar.

The Court, in *Solem* v. *Stumes*, 465 U.S. 638 (1984) authored the following:

> "As a general rule, judicial decisions apply 'retroactively.' *Robinson* v. *Neil*, 409 U.S. 505 (1973). Indeed, a legal system based on precedent has a built-in presumption of retroactivity. Nonetheless, retroactive application is not compelled, constitutionally or otherwise." [citations of the Court omitted].

The Court also noted that since *Linkletter* v. *Walker*, 381 U.S. 618 (1965), the Court has "recognized that the interests of justice and the exigencies of the situation may argue against imposing a new constitutional decision retroactively. 381 U.S. at 628," *Solem*, supra.

Linkletter, and the cases that followed, established the "basic principles of retroactivity" in such cases, which principles implicate:

> "(a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno*, 388 U.S. 293, 297, quoted in *Solem*, supra, at 643.

The *Solem* Court began its holding of nonretroactive applicability of *Edwards* v. *Arizona*, 451 U.S. 477 (1981) [a Fifth Amendment, "*Miranda*" situation] by finding that "the *Edwards* rule has only a tangential relation to truthfinding at trial," for "'the question whether a constitutional rule of criminal procedure does or does not

enhance the reliability of the fact finding process at trial is necessarily a matter of degree' *Johnson* v. *New Jersey*, 384 U.S. 719 at 728, 729 (1966)" as quoted in *Solem*.

The Court then found that while *Edwards* was not "the sort of 'clear break' case that is almost automatically nonretroactive," it did, in fact, "establish a new rule"; *Solem*, supra, therefore, the reliance aspect as to the "old rule" was compelling "even though *Edwards* did not overrule a specific decision" *Solem*, supra, at 650.

Too, "retroactive application of *Edwards* would have a disruptive effect on the administration of justice," the Court concluded, opining that the number of cases where the holding might make a difference is "surely significant." *Edwards* was thus found to be nonretroactive to cases brought upon collateral review.

In the next term of Court retroactivity of *Edwards* was revisited as to those cases that were pending direct appeal, and, it was decided that the holding did indeed apply to cases upon direct review [*Shea* v. *Louisiana*, ___ U.S. ___, 105 S.Ct. 1065 (1985)]. The majority opinion stated that two of the Court's recent opinions "bear importantly upon this issue" *Shea*, 105 S.Ct. at 1068. The first case was *United States* v. *Johnson*, 457 U.S. 537, wherein, to quote the *Shea* majority:

> "The Court in Johnson found persuasive Justice Harlan's earlier reasoning that application of a new rule of law to cases pending on direct review is necessary in order for the Court to avoid being in the position of a super-legislature, selecting one of several cases before it to use to announce the new rule and then letting all other similarly situated persons be unaffected and unprotected by the new rule." *Shea*, supra, at 1069, citations of the Court omitted.

Unless the announced rule is "so clearly a break with the past that prior precedents mandate nonretroactivity," *Shea*, supra, at 1069, new rules [in that instance involving the Fourth Amendment] would apply to "cases subject to direct review by the Court at the time the 'new' decision is handed down." *United States* v. *Johnson*, 457 U.S. at 548, quoted in *Shea* at 1069.

The Court then acknowledged its decision in *Solem* v. *Stumes*, supra, discussed the fact that that involved collateral review, and deemed *Edwards* was to benefit that person seeking direct review, Petitioner Kevin Michael Shea. In so doing, the Court, inter alia, stated, "[I]f the *Edwards* principle is not to be applied retroactively, the only way to dispense equal justice to Edwards and to Shea would be a rule that confined the *Edwards* principle to prospective application, unavailable even to Edwards himself." *Shea*, supra, at 1071.

On 30 April 1986, this Court authored its opinion in *Batson* v. *Kentucky*, 476 U.S. ____, 106 S.Ct. 1712 (1986), which analyzed an "interpretation of *Swain*" which placed upon defendants a "crippling burden of proof" to establish discriminatory employment of peremptory challenges and thereby, did in fact, "reject this evidentiary formulation as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case * * *" *Batson*, 106 S.Ct. 1712 at 1720.

Four members of the *Batson* Court [Chief Justice Burger and Justices White, Rhenquist, and O'Connor] stated that the ruling ought not have retroactive effect.[1]

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[1] Chief Justice Burger cites, inter alia, to *State* v. *Neil*, 457 So.2d 481, at 488 (Fla. 1984) for the proposition, and language that retroactive application would be "a virtual impossibility." With all due respect to the Chief Justice, *State* v. *Neil*, supra [Florida's equivalent

First to broach this issue was Petitioner Earl Allen, who arrived before the Court through the vehicle of habeas corpus review and the denial of a request for a certificate of probable cause to obtain United States Circuit Court of Appeals review of a District Court's denial of his Petition for Writ of Habeas Corpus from a state court murder conviction, the murders having occurred in 1978. Conviction appears to have become final in 1981, *Allen* v. *Hardy*, ___ U.S. ___ (1986).

Allen urged that "the rule in *Batson* should be available to him as a ground for relief on remand," *Allen*, supra, slip opinion at Page 2. The Court concluded that "our decision in *Batson* should not be applied retroactively on collateral review of convictions that became final before our opinion was announced[1]," Id. at 2, 3, footnote of the Court omitted.

Finding that the rule in *Batson* v. *Kentucky* "is an explicit and substantial break with prior precedent" *Allen*, supra, at 3, the Court employed the three factors set forth in *Solem* v. *Stumes*, supra, quoting *Stovall* v. *Denno*, supra, as related to *Linkletter* v. *Walker*, supra, analyzed the same vis a vis *Batson*, and determined nonretroactivity would control. A different result is compelled upon direct review.

A. The Purpose To Be Served By The New Standards.

Over one hundred years ago,

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to *Batson*, supra], was held to be applicable to cases pending on direct appeal [See: *State* v. *Jones*, 485 So.2d 1283 (Fla. 1986), and *State* v. *Castillo*, 486 So.2d 565 (Fla. 1986)] wherein the Court stated, "Our comment in *Neil* * * * was intended to apply to completed cases."

> "this court reversed a state conviction on the ground that the indictment charging the offense had been issued by a grand jury from which blacks had been excluded. We reasoned that deliberate exclusion of blacks is practically a brand upon them, affixed by law, an assertion of their inferiority and a stimulant to race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Strauder* v. *West Virginia*, 10 OTTO 303, 100 U.S. 303, quoted in *Vasquez* v. *Hillery*, ___ U.S. ___, 106 S.Ct. 617 (1986).

When constitutional error "calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. * * * Similarly when a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained" *Vasquez*, supra: [NOTE: Justice White did not join in the foregoing paragraph].

Although the attorney "for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice shall be done,' as he is the 'servant of the law * * *. '" *United States* v. *Agurs*, 427 U.S. 97 at 112 (1976), citing to *Berger* v. *United States*, 295 U.S. 78 t 88. As the *Berger* Court noted, while a prosecutor may strike "hard blows, he is not at liberty to strike foul ones."

The dissent from the denial of certiorari in *McCray* v. *New York*, 103 S.Ct. 2438 (1983) contained the following cogent language:

> "In Swain a closely divided court held that the prosecutor's use of peremptory challenges to strike

> Negroes from the jury panel in one particular case did not deny the defendant equal protection of laws. The majority reasoned that '[t]he presumption in any particular case must be that the prosecutor in using the state's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes.' Id. at 222. The majority concedes that circumstances might arise where the purposes of the peremptory challenges are being perverted. Id. at 224."

It is worthy of note that in *Batson*, supra, the sole showing made by the Petitioner, and that which the Court held justified a reversal for a hearing upon the allegations, giving the prosecution, if "purposeful discrimination" be shown, an opportunity to "come forward with a neutral explanation for his action" [*Batson*, 106 S.Ct. 1712 at 1723] was that the prosecution excluded all black jurors peremptorily. In the case at bar, a hearing in fact, was had, albeit initially for an inquiry into the prosecution's telephonic attempt to exclude all blacks from the second venire panel. Purposeful discrimination was established, it is submitted.

"The purpose of trial by jury, as noted in *Duncan* [*Duncan* v. *Louisiana*, 391 U.S. 145 (1968)] is to prevent government oppression by providing a 'safeguard against the corrupt or overzealous prosecutor and against the complaint, biased or eccentric judge' 391 U.S., at 156 "*Burch* v. *Louisiana*, 441 U.S. 130, 134. Of course, concomitant therewith "is the determination of the truth," *Tehan* v. *United States ex rel Shott*, 382 U.S. 406, 416 (1966). The jury makes this decision, and "[a]ny practice that threatens the jury's ability properly to perform that function

poses a similar threat to the truth determining process itself." *Brown* v. *Louisiana*, 447 U.S. 323, 335 (1980).

The Assistant United States Attorney involved in the case at bar deliberately sought to exclude blacks based upon his feelings that were blacks upon the jury, it would result in his "inability to convince all the jurors of the accused's guilt" and he, by his exercise of peremptory challenges, removed any "guarantee that the minority voices will actually be heard"[12] *Brown*, supra, at 332 [footnote of the Court omitted; however the observations regarding a "hung jury" are quite applicable at bar].

The prosecutor's statements in the case at bar are quite akin to those presented the Appeals Court in *Booker* v. *Jabe*, 775 F.2d 762 (6th Cir. 1985), wherein that state court prosecutor had said, inter alia, [to a fellow prosecutor, apparently] "* * * we can get a conviction in this case if we don't get a black jury." Not only did the prosecutor not deny the same, he attempted to justify his actions by stating he was a "trial lawyer" and blacks apparently caused "four consecutive hung juries three years ago" *Booker* v. *Jabe*, at 765. While finding itself foreclosed from reversing upon an "equal protection" argument due to this Court's ruling in *Swain* v. *Alabama*, the Appeals Court noted that when *Swain* had been decided, the Sixth Amendment had not yet been held binding upon the States [*Duncan* v. *Louisiana*, 391 U.S. 145 (1968)], and therefore, decided and reversed the matter in conformance with Sixth Amendment provisos, which is what is in fact presented herein. Worthy of quote for consideration in this point is the following language by the Sixth Circuit:

> "Our review of the Supreme Court's rationale for deciding these Sixth Amendment controversies leads to the following conclusions. The Sixth Amendment

> guarantees that a criminal charge will not be tried before a jury that fails to represent a cross-section of the community as a consequence of a method of jury selection that systematically excludes a cognizable group from jury service. Two rationales support this requirement. First, an impartial jury may protect the defendant from an improper conviction by bringing laypersons' common sense to bear upon the evidence supporting the prosecution's charges. Second, an impartial jury represents diverse elements of the community from which it is drawn and thereby makes a vital contribution to public confidence in the integrity and democracy of the judicial system. The impartial jury provides its safeguards during trial and, more significantly, during its deliberations. It is during deliberation that the diverse experiences of the members of a properly constituted jury are brought to bear on the often subtle nuances involved in evaluating witnesses' credibility and permissive inferences drawn from the evidence. Only in returning its verdict does the jury express the community's decision to punish or free the defendant."

Thus, the Petitioner urges upon the Court, that "serving a criminal defendant's interest in neutral jury selection procedures," *Allen*, supra, at 4, enhances the truth-finding process at trial to the degree that it must be held retroactive.

While *Batson*, supra, insures that States' "do not discriminate against citizens who are summoned to sit in judgment against a member of their own race," Id. at 4, it need be remembered that the case at bar was a Federal prosecution with an officer of the United States Government engaging in the discrimination.

Respectfully taking issue with the Court in one aspect of the holding in *Allen*, supra, and in particular that "the new rule joins other procedures that protect a defendant's interest in a neutral factfinder," Id. at 4, the Petitioner

would note that in almost all Federal prosecutions, voir dire is generally conducted by the trial judge of the jury as a whole, and, as opposed to individual voir dire by counsel, does not provide the basis for analysis of ability of jurors that one might wish. And, a jury instruction not to base a decision on bias, passion or prejudice, may not be sufficient [See particularly: *United States* v. *Heller*, 785 F.2d 1524 (11th Cir. 1986)].

Thus, the Petitioner would suggest to the Court that the accuracy and truthfinding process of criminal trials is only enhanced by the rule in *Batson*.

B. The Extent Of Reliance By Law Enforcement Authorities On The Old Standards.

The Court in *Allen*, as regards the above, held:

> "Moreover, the factors concerning reliance on the old rule and the effect of retroactive application on the administration of justice weigh heavily in favor of nonretroactive effect. As noted above, Batson not only overruled the evidentiary standard of *Swain*, it also announced a new standard that significantly changes the burden of proof imposed on both defendant and prosecutor. There is no question that prosecutors, trial judges, and appellate courts throughout our state and federal systems justifiably relied on the standard of *Swain*[3]." [footnote of the Court omitted] *Allen*, supra at 5.

Justice Marshall, in his dissenting opinion, however, finds that "the Court seriously overestimates the 'reliance interest of law enforcement officials' in the old regime. This is not a case in which primary conduct by such officials was permitted by one decision of this Court and then prohibited by another. *Swain* made quite clear that the use of peremptory challenges to strike black jurors on

account of their race violated the Equal Protection Clause.". *Allen*, dissenting opinion at Page 4.

The instant situation, aside from not being one which concerns the "Equal Protection Clause" differs from the usual case heretofore brought under *Swain*, as the issue of burden of proof or evidentiary standard is not present. Due to governmental misconduct, an inquiry was had at the trial level. The Appeals Court held *Swain* applied in that Petitioner was unable to prove discrimination in case after case or, as the Court fully phrased it, "Systematic and intentional conduct on the part of the government calculated to exclude blacks from juries." [J.A. 56].

It is submitted that it has been the law since *Strauder* v. *West Virginia*, 100 U.S. 303 (1880) that one could not purposefully discriminate against members of a defendant's race. As the Court stated in *Batson*, supra,

> "The principles announced in *Strauder* never have been questioned in any subsequent decision of this court. Rather, the court has been called upon repeatedly to review the application of those principles to particular facts[13] [footnote omitted]. A recurring question in these cases, as in any case alleging a violation of the Equal Protection Clause, was whether the defendant had met his burden of proving purposeful discrimination on the part of the state." Batson, supra, 106 S.Ct. at 1719.

Thus, the principle prohibiting exclusion has been in existence, only the method of proof has changed, as the old standard rarely afforded the ability to prove such exclusion, particularly in light of the presumption of proper uses of challenges [Compare: *Booker* v. *Jabe*, supra; Statement of Case herein; and *McCray* v. *Abrams*, 750 F.2d 1113 (2nd Cir. 1984)].

It is submitted that such reliance, as Justice Marshall suggests, may have been misplaced in cases such as the one at bar, especially where actual proof has been established.

Even if, however, reliance on the *Swain* standard were prevalent throughout the country, and thereby precludes retroactivity under collateral review, the Petitioner offers that the same ruling ought not apply to those cases on direct review.

The Court in *Solem* v. *Stumes*, supra, at 1343, authored the following:

> "Unjustified 'reliance' is no bar to retroactivity. This inquiry is often phrased in terms of whether the new decision was foreshadowed by earlier cases, or was a 'clear break with the past'[6]." [footnote of the Court omitted].

The decision of the Court in *Batson*, it is submitted, was foreshadowed by earlier cases. At the sake of redundancy, the principle espoused in *Batson* has a long history indeed. And, it has been acknowledged that *Swain* has been the subject of "almost universal and often scathing criticism" *McCray* v. *Abrams*, 750 F.2d 1113 (2nd Cir. 1984) quoting the dissent of Justice Marshall in *McCray* v. *New York*, 461 U.S. 961 (1983); see also: *United States* v. *Childress*, 715 F.2d 1313 (8th Cir. 1983).

This Court, in 1983, denied certiorari in *McCray* v. *New York*, supra, however, as the Sixth Circuit noted in *Booker* v. *Jabe*, supra:

> "A majority of the Supreme Court has expressed its willingness at the proper time to consider 'whether the Constitution prohibits the use of peremptory challenges to exclude members of a particular group from a jury[2]." [footnote omitted] *McCray* v. *New York*, 461 U.S. 961 (1983).

Justice Stevens, joined by Justices Powell and Blackmun, did not reflect disagreement with the dissenting opinion of Justices Marshall and Brennan, but rather, expressed the belief "further consideration of the substantive and procedural ramifications of the problem by other Courts will enable us to deal with the issue more wisely at another date,", *McCray* v. *New York*, supra, allowing the States "to serve as laboratories in which the issue receives further study."

California, Massachusetts and Florida had, by the time of *Batson*, held in a similar vein, as did the Second Circuit in *McCray* v. *Abrams*, supra, on Sixth Amendment grounds, which was the same avenue employed by the Sixth Circuit in *Booker* v. *Jabe*, supra. Compare also: *United States* v. *Green*, 742 F.2d 609 at 611 (footnote) (11th Cir. 1984) and as quoted in Petition for Writ of Certiorari at Page 8; *United States* v. *Hawkins*, 781 F.2d 1483 (11th Cir. 1986); *United States* v. *Jackson*, 696 F.2d 578 (8th Cir. 1982). Thus, it is submitted that it could reasonably be foreseen that the Court, having long adhered to the principles of condemning discrimination in the "system of justice" due to race, would implement a procedure to protect a defendant's Sixth Amendment guarantees from discriminatory use of peremptory challenges. Indeed, the Court in *Swain* held "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause" *Swain*, 380 U.S. 202, 204. Therefore, prosecutors have "been on notice" that any deliberate conduct was violative of the Constitution; the lessening of a "crippling burden of proof" as announced in *Batson*, supra, ought not provide the offender a refuge nor deny the person aggreived the benefit of the ruling. [See: Justice White's opinion in *Batson*, supra].

Finding that "the reliance interest of law enforcement officials is 'compelling'", the *Allen* Court concludes this "supports a decision that the new rule should not be retroactive" *Allen*, supra, citing to *Solem* v. *Stumes*, supra, at 650.

Following *Solem*, *Shea* was decided, and *Edwards*, despite compelling reliance on the old standards, was held to apply retroactively to cases pending direct appeal.

Even if there be compelling reliance on the old standards in the instant case, the decision in *Batson* ought apply to this direct appeal.

C. The Effect On The Administration Of Justice Of A Retroactive Application Of New Standards.

Referring to its opinion in *Solem* v. *Stumes*, supra, the *Allen* Coourt stated that "retroactive application of the *Batson* rule on collateral review of final convictions would seriously disrupt the administration of justice," *Allen*, supra, at 5. Quoting in part from *Solem* v. *Stumes*, supra, at 650, the Court continued: "[M]any final convictions therefore would be vacated, with retrial 'hampered by problems of lost evidence, faulty memory, and missing witnesses'", Id. at 5, particularly after the passage of years since finality attached.

As the Court quite apparently recognized in *Shea* v. *Louisiana*, a different circumstance occurs in cases still pending final review. In fact, in response to this, the *Shea* Court stated, "We note, furthermore, that several courts had applied *Edwards* to cases pending on direct review without expressing concern about lapse of time or retroactivity and without any apparent administrative difficulty." *Shea* v. *Louisiana*, supra, 105 S.Ct. at 1071.

As Petitioner pointed out above, Florida has held its equivalent of *Batson*, *State* v. *Neil*, supra, retroaction to cases pending direct review.

Retroactivity of *Batson* to cases pending direct review would clearly limit the number of affected cases the *Allen* decision expressed concern regarding, and any burden upon the administration of justice would at best be minimal, for the elapsed time ought not be any greater than any other case pending review and where reversal upon other grounds might occur.

In closing, this Court has generally held Sixth Amendment cases nonretroactive [See: ie, *DeStefano* v. *Woods*, 392 U.S. 634 (1968); *Gosa* v. *Mayden*, 413 U.S. 665 (1973)]. Of course, in those cases, the basic integrity of the factfinding process was not in question. When, however, the integrity of the factfinding process was in fact called into question, the Court did hold retroactivity would apply, at least to that case pending direct review, and those other few affected by the prior procedure. *Brown* v. *Louisiana*, 447 U.S. 323 (1980), and see concurring opinion of Justice Powell, joined by Justice Stevens at 335. The Petitioner submits that while the facts of *Brown*, supra, differ, obviously, from this case, the same rationale as to the removal of "minority voices," "hung juries," and "less accurate factfinding" *Brown* v. *Louisiana*, supra, at 332, is just as applicable. As the *Brown* majority [at 332] stated:

> "Though the line separating the permissible jury practice from the impermissible may not be the brightest, [citations omitted] a line must be drawn somewhere and the constitutional inviolability of that border must be scrupulously respected lest the purpose and functioning of the jury be seriously impaired."

Coupling this with the rather minimal effects upon the administration of justice that a limited ruling of retroactivity would entail, the Court ought hold *Batson* retroactive to cases pending direct review.

CONCLUSION

The Court should hold that *Batson* v. *Kentucky*, supra, applies to WILLIE DAVIS BROWN's conviction which was not yet final and the time of the decision and reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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